

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Petition for Declaratory Ruling of the Nebraska)	
Public Service Commission and the Kansas)	
Corporation Commission for Declaratory)	
Ruling or, in the Alternative, Adoption of Rule)	
Declaring that State Universal Service Funds)	
May Assess Nomadic VoIP Intrastate)	
Revenues)	

**Reply Comments of The Nebraska Rural Independent Companies
and the Nebraska Telecommunications Association**

Dated: September 24, 2009

The Nebraska Rural Independent Companies

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**Reply Comments of The Nebraska Rural Independent Companies and Nebraska
Telecommunications Association**

I. Introduction.

In response to the Commission's Public Notice of the above-captioned Petition (the "*Petition*") and request for comments,¹ a total of nineteen comments were filed. The overwhelming majority of the commenters urge the Commission to grant the relief requested in the Petition by issuance of a declaratory ruling² as requested by the *Petition*. Only Google Inc. seeks an outright denial of the *Petition*. Three additional commenters, Vonage Holdings Inc. ("Vonage"), Voice of the Net Coalition and 8X8, Inc., seek denial of the *Petition* or alternatively, establishment of a rulemaking proceeding to address universal service fund ("USF") contribution requirements on interconnected VoIP services. AT&T Inc. ("AT&T") supports the objective of the *Petition* to require facilities-based and nomadic interconnected VoIP providers to contribute

¹ "Comment Sought on Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling, et al.", DA 09-1774, (Dkt. No. 06-122) (rel. August 10, 2009).

² The National Association of Regulatory Utility Commissioners ("NARUC") urged the Commission to issue an "interpretative rule" clarifying that states may assess nomadic VoIP providers to support state universal service programs. See, Initial Comments of NARUC at 1.

to state universal service support mechanisms, but urges that an expedited rulemaking proceeding by the Commission is required for this purpose.³ Verizon and Verizon Wireless urge that the Commission should not address the narrow issues presented in the *Petition*, but rather should finally resolve the overarching and outstanding questions regarding classification of VoIP and IP-based services.⁴

The thirteen sets of comments supporting grant of the relief sought by the *Petition* were filed on behalf of four individual state commissions,⁵ NARUC, a consumer advocacy group,⁶ and seven associations, individual entities or groups of entities. The supporters of the *Petition* not only request the Commission to rule that the *Vonage Preemption Order*⁷ does not preclude states from imposing USF assessments on providers of nomadic interconnected VoIP services, but further uniformly request that the Commission would promptly issue such a ruling. The Nebraska Rural Independent Companies (“Nebraska Companies”) and the Nebraska Telecommunications Association (“NTA”) join in this request to the Commission for the reasons set forth in their Comments filed herein and as set forth in these Reply Comments.

II. The Commission Should Proceed to Promptly Issue a Declaratory Ruling in Response to the *Petition*.

In the *Vonage Preemption Order* the Commission stated “we preempt an order of the Minnesota Public Utilities Commission . . . applying its traditional ‘telephone company’ regulations to Vonage’s DigitalVoice service.”⁸ However, it is not clear from the *Vonage Preemption Order* whether the Commission intended to include state USF assessments on the

³ Comments of AT&T Inc. at 1-2.

⁴ Comments of Verizon and Verizon Wireless at 1.

⁵ See, Comments of the District of Columbia Public Service Commission, New Mexico Public Regulation Commission, New York Public Service Commission and Tennessee Regulatory Authority.

⁶ See, Comments of National Association of State Utility Consumer Advocates.

⁷ *Vonage Holdings Corp. Pet. For Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Red 22404 (2004) (“*Vonage Preemption Order*”), *aff’d*, *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007).

⁸ *Vonage Preemption Order* at para. 1.

intrastate portion of nomadic interconnected VoIP service provider revenues among “traditional telephone company regulations” which the Commission preempted.

There is no discussion in the *Vonage Preemption Order* to affirmatively provide guidance as to whether state USF assessment of the intrastate portion of interconnected VoIP service provider revenues was intended to be preempted. The single basis in the *Vonage Preemption Order* cited by those who advocate that the Commission did preempt such state USF assessment is citation to paragraph 10 of such *Order*⁹ which states:

[T]he laws and regulations in question [referring to laws and regulations governing a ‘telephone company’] require such companies to obtain operating authority, file tariffs, and provide and fund 911 emergency services.

and specifically to footnote 28 cited by the Commission at the end of the foregoing sentence. Such footnote cites a series of six Minnesota statutes and regulations, including Minn. Stat. § 237.16. This section has thirteen sub-sections. Sub-section 1 addresses the requirement to obtain operating authority (specifically addressed by the Commission in the above-quoted statement). Sub-section 9 addresses the requirement to contribute to the Minnesota USF.

The Commission’s preemption focus in the *Vonage Preemption Order* was on the certification requirements and 911 service requirements that the Minnesota Commission imposed on Vonage. The Commission specifically stated that it would refer to Minnesota’s certification requirements and provisioning of 911 service as “telephone company regulations” in the *Vonage Preemption Order*.¹⁰ Thus, the scope of the Commission’s phrase “telephone company regulation” used throughout the *Vonage Preemption Order* is limited to certification and 911 service requirements. Confirming that the Commission did not intend to address state USF

⁹ See, e.g., Vonage Comments at 14; AT&T Comments at 4.

¹⁰ *Vonage Preemption Order* at fn. 30 where the Commission states as follows: “While the [Minnesota Commission’s Vonage] order states ‘the Commission will require that Vonage comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service,’ the order does not enumerate the statutory and rule provisions to which it is referring other than those specifically listed in note 27 above. See *supra*

assessment of interconnected VoIP service revenues in the *Vonage Preemption Order* is the following statement:

That proceeding [the *IP-Enabled Services Proceeding*] will resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, *concerning issues such as the Universal Service Fund . . . and the extent to which states have a role in such matters.*"¹¹

The Nebraska Companies and the NTA submit that the foregoing statements by the Commission in the *Vonage Preemption Order* demonstrate that the Commission did not intend to preempt state USF assessments on the intrastate portion of nomadic interconnected VoIP provider revenues.

Of course, the foregoing position is consistent with the position set forth by the Commission's General Counsel in the *Amicus Brief*¹² commenting on the *NPSC USF Order*¹³ which sought to impose the Nebraska USF surcharge on interconnected VoIP service provider intrastate revenues. The General Counsel stated:

In contrast to the *Vonage Preemption Order*, the *NPSC USF Order* does not present a conflict with the NPSC's rules or policies. Rather, the NPSC's decision to require interconnected *VoIP* providers to contribute to the state's universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.¹⁴

To the extent that uncertainty exists with regard to whether the Commission in the *Vonage Preemption Order* preempted the assessment of state USF on the intrastate portion of

note 28. *We will refer to these requirements, collectively, throughout this Order as either 'telephone company regulations' or 'economic regulations.'*" (emphasis added)

¹¹ *Id.* at fn. 46 (emphasis added). See also, para. 44 and fn. 156.

¹² *Amicus Brief* submitted on behalf of the United States Department of Justice and the Federal Communications Commission on August 5, 2008, in *Vonage Holdings Corp v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009).

¹³ *In re Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund*, App. No. NUSF-1, Prog. Order No. 18 (April 17, 2007) ("NPSC USF Order").

¹⁴ *Amicus Brief* at 15 (emphasis added).

nomadic interconnected VoIP service provider revenues, the declaratory ruling sought by the *Petition* is the proper procedural mechanism to resolve such uncertainty. As pointed out in the Comments of the Nebraska Companies and the NTA, pursuant to 47 C.F.R. § 1.2 “[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion *issue a declaratory ruling terminating a controversy or removing uncertainty.*” (emphasis added)¹⁵

The Nebraska Companies and NTA urge the Commission to issue a declaratory ruling adopting the reasoning of the *Amicus Brief* that the contribution rules established by the NPSC to implement the *NPSC USF Order* are fully consonant with the FCC’s rules and policies and are contemplated by § 254(f) of the Act. The Commission should expressly find that the *Vonage Preemption Order* provides no basis to conclude that the Commission has preempted state commissions’ authority to assess state universal service fund surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenues.

III. The Commission Should Resolve Potential Conflicts Between States Resulting from Inconsistent Methods of Assessing the Intrastate Portion of Nomadic VoIP Service Provider Revenues.

In their Comments filed in this matter, the Nebraska Companies and NTA recommended that a customer’s billing address be utilized to determine the state with which to associate the intrastate portion of nomadic interconnected VoIP provider revenues, unless it would be unduly burdensome for a particular service provider to comply with this requirement. In such event, the Rural Companies and NTA suggested that the customer’s registered location could alternatively be used.¹⁶

Other commenters providing recommendations to the Commission regarding the methodology that should be approved by the Commission for state assessment of nomadic VoIP

¹⁵ See, Comments of the Nebraska Companies and NTA at 5.

USF contributions favored use of the customer's billing address. AT&T recommended that the Commission should require states to rely on "customers' service addresses (also known as the primary place of use)" and stated that "[s]uch an approach is consistent with the Mobile Telecommunications Sourcing Act [4 U.S.C. §§ 116-126], in which Congress required states to use a mobile telecommunications service customer's primary place of use for purposes of determining jurisdiction for state taxation purposes."¹⁷ NARUC similarly supports the use of the billing address, and observes that such approach would be "consistent with § 254, [and] that other States considering rules to assess nomadic VoIP providers will adjust their rules to line up with FCC sanctioned approach."¹⁸ The National Association of State Utility Consumer Advocates endorses assessment of intrastate nomadic VoIP provider service revenues based upon customer address, and offers the view that any problems with state assessment mechanisms based upon an alternate methodology could be resolved on a "case-by-case basis".¹⁹ The National Exchange Carrier Association suggested that the Commission should, in its declaratory ruling, indicate that it would "act promptly to resolve" any alleged double assessment by states.²⁰ The New Mexico and District of Columbia regulatory commissions support assessment based upon customer address, with the District of Columbia Public Service Commission stating that such approach "does not allow the VoIP service provider to 'game the system' by allocating revenues to states depending on their contribution rates."²¹

The Commission should issue a declaratory ruling approving the use of the customer's billing address as the basis for determining the state with which the intrastate portion of nomadic

¹⁶ *Id.* at 13-14.

¹⁷ Comments of AT&T at 11.

¹⁸ Comments of NARUC at 10.

¹⁹ Comments of National Association of State Utility Consumer Advocates at 3-4.

²⁰ Comments of National Exchange Carrier Association, et al. at 7.

²¹ Comments of District of Columbia Public Service Commission at 5. *See also*, Comments of New Mexico Public Regulation Commission at 8.

interconnected VoIP service provider revenues will be associated, and thus, avoid duplicate state USF assessment of such revenues.

IV. Conclusion

The Commission should act promptly to issue a declaratory ruling in response to the *Petition* declaring that state USF assessment of intrastate nomadic interconnected VoIP service provider revenue is not and has not been preempted, so long as the state does not assess interstate revenue. In such declaratory ruling, the Commission should further declare that states should utilize the approach developed in regard to assessment of state USF surcharges on revenues derived from jurisdictionally mixed services furnished by CMRS providers to resolve the issues surrounding assessment of such surcharges on the intrastate portion of nomadic interconnected VoIP service provider revenue. Finally, the Commission should approve the customer billing address as a uniform method for determining the state with which intrastate nomadic interconnected VoIP service provider revenue will be associated, and thus, avoid duplicate state USF assessment of such revenue.

Dated: September 24, 2009.

THE NEBRASKA RURAL INDEPENDENT
COMPANIES

Arlington Telephone Company,
The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
Consolidated Telecom, Inc.,
Consolidated Telephone Company,
Curtis Telephone Company,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hamilton Telephone Company,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Company,
K & M Telephone Company, Inc.,
Nebraska Central Telephone Company,
Northeast Nebraska Telephone Company,
Rock County Telephone Company,
Stanton Telecom, Inc. and
Three River Telco

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